

**From fair dealing to fair use: Striking a balance between competing
interests in South African copyright law**

By

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Submitted in partial fulfilment of the requirements for the degree

LLM (Intellectual Property Law)

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October 2023

ACKNOWLEDGEMENTS

To my mother who continually supports and believes in me, thank you.

Thank you, greatly, Dr. Okorie for your guidance, kindness and patience in my research. Thank you for your dedication in sharing your knowledge and expertise with me.

To the postgraduate administrator, Lizette du Plessis, thank you for your diligent assistance from my inception into the Intellectual Property Law LL. M Programme till submission of my dissertation.

I extend sincere gratitude to the following organisations for financially supporting my degree:

1. The University of Pretoria Faculty of Law
2. The Fundi R10GoesALongWay initiative
3. Midvaal Municipality

ABSTRACT

The study has its motivation from the contentious South African Copyright Amendment Bill [B13-2017] that has been before Parliament for many years, and more recently, been passed by the National Council of Provinces and awaiting President's assent. The Amendment Bill proposes, *inter alia*, a shift from the exception approach of 'fair dealing' to that of 'fair use' and this forms the basis of the study. Since copyright exceptions and limitations (including fair dealing and fair use) are a way in which competing interests in copyright law are sought to be harmonised, the study is concerned with whether such harmony would ensue notwithstanding the proposed shift of doctrines in South Africa.

In founding its argument and addressing the core issue, the dissertation explores the idea of competing interests and its nexus with the exceptions and limitations in copyright law. Further, it engages in a comparative study to juxtapose the fair dealing and fair use provisions as employed in South Africa and other countries like the United States and Singapore. After conducting such comparative study, the dissertation analyses whether the proposed fair use is suitable for South Africa through a discussion of the international obligations, important socio-economic considerations and fundamental legal principles such as the rule of law that underpin South Africa.

In conformity with its discussions, the study deems fair use, as proposed, to be unsuitable for the country. However, it does not suggest that the current fair dealing is adequate. In fact, it reveals the gaps in fair dealing through discussing the findings of the famous case of *Moneyweb (Pty) Ltd v Media 24 Ltd and another* [2016] 3 All SA 193 (GJ). The study shows more interest in the principles that the South African legislator followed (or ought to follow) in reforming the copyright exceptions. It establishes and analyses five principles or factors that the legislator should use as guidance when revising the exception provisions. Ultimately, it submits that a revision of the fair dealing clause may be more practicable than a reform to fair use.

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CHAPTER 1

INTRODUCTION

1.1. Background

South African copyright is a creature of statute and is regulated by the Copyright Act 98 of 1978 (the Act). The Act is underpinned by international treaties such as the Berne Convention for the Protection of Literary and Artistic Works of 1886 (Berne Convention) and the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPs) to which South Africa is a signatory. These treaties set minimum standards with which member countries must conform in their domestic copyright laws, hence, the Act must ensure to be in line with the obligations set out in these conventions.

The Act does not directly define copyright but its provisions suggest that copyright is a limited monopoly that is granted to the author or owner of a creative work if their work is original, falls under one or more of the categories of works stipulated in the Act, and is in a material form.¹ Dean describes it as:

the exclusive right in relation to work embodying intellectual content (ie the product of the intellect) to do or to authorise others to do certain acts in relation to that work, which acts represent in the case of each type of work the manners in which that work can be exploited for personal gain or profit.²

There are nine categories of works in which South African copyright subsists, namely, literary works, musical works, artistic works, cinematographic films, sound recordings, broadcasts, programme-carrying signals, published editions, and computer programs.³ Copyright, in line with the different works, is considered to be a 'bundle of rights'.⁴ It grants owners of different protected works (or creations) certain exclusive rights in terms of which they control the use of their works in various ways and receive remuneration therefrom.⁵ For instance, only an owner of literary or musical work can reproduce his work in any manner or form or authorise such reproduction.⁶ The

¹ Copyright Act 98 of 1978 (Copyright Act) secs 2(1) & (2).

² OH Dean *Handbook of South African Copyright Law* (2015) at 1.

³ Copyright Act sec 2(1).

⁴ APS Van der Walt *et al Law of Intellectual Property in South Africa* (2016) at 180.

⁵ O Dean *et al Introduction to Intellectual Property Law* (2014) at 1.

⁶ Copyright Act sec 6(a).

purpose, herein, is to enable the right-holders to derive moral and financial benefit from their works and thereby encourage further creativity.⁷

1.1.1. Different stakeholders

The exclusive rights granted under copyright law are a way in which authors or owners are awarded a monopoly, for a limited period,⁸ over their creations. However, such monopoly is not absolute.⁹ Right-holders are not permitted to exercise their entitlements in a manner that impedes on the constitutional rights of others. Their rights should also not be so wide as to disallow third parties' reasonable access and engagement with the copyright-protected material in line with their rights to freedom of expression and access to knowledge.¹⁰ Mhlongo asserts that:

Copyright law is established and developed in the public interest. The accepted obligation on copyright law arising out of the right to freedom of expression is that the public should have access to copyright works in order to develop. What this has essentially led to is the development of certain exceptions which allow people to make use of copyright materials without permission from the copyright owner.¹¹

As was held in *Moneyweb (Pty) Ltd v Media 24 Ltd*,¹² copyright – as an intellectual property right – is protected under the constitutional property clause.¹³ As such, copyright and the right to freedom of expression are equal before the Constitution.¹⁴ These rights must be weighed up against each other and limited accordingly.¹⁵ The South African Copyright Act enumerates detailed and specific exception provisions in terms of which owners' rights are limited to acknowledge users' legitimate interests and promote public interest.¹⁶ Part of these exceptions are the popular 'fair dealing'

⁷ Dean (n 5) at 3.

⁸ Copyright Act sec 3(2).

⁹ *Moneyweb (Pty) Ltd v Media 24 Ltd & another* [2016] 3 All SA 193 (GJ) para 108-110.

¹⁰ The Constitution of the Republic of South Africa, 1996 (the Constitution) secs 16(1) & 29.

¹¹ B Mhlongo 'Balancing the protection for intellectual property rights of copyright holders against the constitutional right to freedom of expression: A comparison of the South African approach and the United States of America's approach' LLM dissertation, University of KwaZulu-Natal, 2018 at 3-4.

¹² *Moneyweb* (n 9) para 108.

¹³ The Constitution sec 25(4)(b).

¹⁴ Mhlongo (n 11) at 4.

¹⁵ *Moneyweb* (n 9) para 107-110; Constitution sec 36(1).

¹⁶ T Schonwetter & CB Ncube 'New hope for Africa? Copyright and access to knowledge in the digital age' (2011) 13 *Emerald Group Publishing Limited* at 4; Copyright Act secs 12-19B.

provisions,¹⁷ which are at the centre of this dissertation. Other states such as the United States (US) and Singapore make reference to 'fair use' instead.

'Fair dealing' is a specific provisions approach which incorporates an exhaustive list of copyright exceptions and limitations whereas 'fair use' encompasses broad, open-ended limitation provisions.¹⁸ Legal systems, worldwide, adopt either of these approaches based on their legal contexts and policy. Section 12(1) of the Act states that, in respect of literary or musical work, it is considered fair dealing to use the work for research or private study, criticism or review of such work or for the purpose of reporting current events. The section then continues to enumerate specific dealings which do not constitute copyright infringement in respect of literary or musical works. For example, it is not infringement if the work is used for the purposes of judicial proceedings or illustration in a publication.¹⁹ The provisions under section 12 apply *mutatis mutandis* to other types of works.²⁰ The Act, therefore, clearly lays out the uses that can be argued as 'fair dealing' of the material and other uses that are naturally not infringing.

The above indicates that copyright law serves both private and public interests.²¹ Private interest being copyright holders' exclusive rights to reap the fruits of their creative works and public interest being the need of the public to access and use copyright-protected works.²² Copyright exceptions and limitations also function as defences to copyright infringement for the purposes of ensuring, on one hand, that no absolute monopoly is afforded to authors or copyright owners regarding access to their works,²³ and on the other hand, allowing consumers to actively engage with the copyright-protected material. Accordingly, the two crucial groups with diverging interests in copyright law are the copyright owners and users.²⁴

¹⁷ Copyright Act sec 12(1).

¹⁸ Schonwetter & Ncube (n 17) at 6-7.

¹⁹ Copyright Act secs 12(2) & (4).

²⁰ Copyright Act secs 14-19.

²¹ T Pistorius & OS Mwim 'The impact of digital copyright law and policy on access to knowledge and learning' (2019) 10 *Journal of the Reading Association of South Africa* at 2.

²² Pistorius & Mwim (n 22) at 2.

²³ J Holland 'Copyright law and freedom of expression in South Africa' (2017) 8 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* at 6.

²⁴ V Elia 'Judicialization and the copyright war: Balancing of conflicting interests through the Court of Justice of the European Union', Lund University, 2015 at 20.

Schonwetter and Ncube hold that, copyright law, by creating exceptions, is considered a 'legal environment in which a fair and optimal balance ought to be struck between the competing interests'.²⁵ Thus, it is through these exception provisions – fair dealing (and use) – that a balance, between copyright owners and users (the public at large), is sought to be achieved.

1.2. Motivation for the study and problem statement

Due to the rapid technological change in the society, legal principles that have been applicable for decades are becoming irrelevant and outdated.²⁶ The emergence and progression of the digital environment is, *inter alia*, rendering it more challenging for legal systems to successfully balance the opposing interests under copyright.²⁷ It engenders unconventional uses of copyright-protected material that are either not explicitly or at all recognised or protected in the current laws, and the society is becoming more aware of the legal principles applicable to them.²⁸ Factors such as these, result in constant calls to develop and reform domestic copyright laws.

South Africa is not an exception to copyright policy challenges. In fact, it was only recently that Blind SA, an organisation for blind and visually disabled persons, approached the High Court for an order declaring the Copyright Act unconstitutional insofar as it unjustifiably limits the rights of persons with print and visual disabilities.²⁹ The Act makes no exception provision to enable print and vision impaired persons to convert copyright-protected material into suitable format, and thereby, access it (i.e., accessible format copies). The High Court found in favour of the applicant and declared sections 6 and 7, read with section 23 of the Act unconstitutional and the Constitutional Court confirmed this.³⁰

South African legislature is in the process of amending the Act through the Copyright Amendment Bill [B13-2017] (Amendment Bill). The Amendment Bill proposes, *inter alia*, that section 12 of the principal Act – exception provisions for literary and musical works which includes the fair dealing provisions – is repealed and sections 12A, 12B,

²⁵ Schonwetter & Ncube (n 17) at 4.

²⁶ PK Yu 'Fair use and its global paradigm evolution' (2019) 1 *University of Illinois Law Review* at 126-127.

²⁷ Schonwetter & Ncube (n 17) at 2.

²⁸ RL Okediji 'The limits of international copyright exceptions for developing countries' (2019) 21 *Vanderbilt Journal of Entertainment & Technology Law* at 714.

²⁹ *Blind SA v Minister of Trade, Industry and Competition and Others* [2021] JOL 52197 (GP).

³⁰ *Blind SA v Minister of Trade, Industry and Competition and Others* [2022] JOL 55373 (CC).

12C and 12D are inserted. Unlike in the Act where the phrase ‘fair dealing’ is used,³¹ the proposed section 12A refers to ‘fair use’. The proposed fair use model is proclaimed to have its inspiration from the Singapore’s legislation.³² On face value, this might seem to be a negligible wording change, however, it is in fact a radical shift that could have significant policy implications.³³

The Amendment Bill lists purposes similar to those found in section 12(1) of the Act such as criticism, research and news reporting but those only function as an illustration of what may be permissible.³⁴ It states that to determine whether an act in relation to work constitutes fair use, all relevant factors, such as the nature of the work, purpose and character of the use and substantiality of the affected part of the work, must be considered.³⁵ According to this approach, any use may constitute fair use as per the guiding factors.

It is mainly argued that fair dealing is rigid insofar as it provides an exhaustive list of protected uses (or exceptions) while fair use portrays flexibility since it sets out factors that the court must consider to decide whether a particular use qualifies as an exception.³⁶ Karjiker is convinced that technology companies are the main stakeholders lobbying for the departure from fair dealing to fair use because, as alluded to earlier, the world is faced with high-speed technological developments with which the law cannot instantly catch-up.³⁷ Thus, the proponents of fair use believe that more flexible copyright exceptions would serve the purpose.

Karjiker, however, holds that the claimed flexibility that fair use may offer comes at a much higher price of uncertainty and ‘concomitant increased litigation’ and may result in South Africa breaching its treaty obligations.³⁸ He holds that the proposed fair use provisions set no definite boundaries for copyright owners and users to know or stick to – the boundaries are only established on a case-by-case basis through litigation.³⁹

³¹ Copyright Act sec 12(1).

³² Parliamentary Monitoring Group ‘Copyright Amendment Bill: DTI & CIPC response on flagged clauses’ (2018) <https://pmg.org.za/committee-meeting/26598/> (accessed on 15 September 2023).

³³ S Karjiker ‘Should South Africa adopt fair use? Cutting through the rhetoric’ (2021) *Juta’s Journal of South African Law* at 241.

³⁴ Copyright Amendment Bill [B13-2017] sec 12A(1)(a).

³⁵ Amendment Bill sec 12A(1)(b).

³⁶ Karjiker (n 34) at 242-243.

³⁷ Karjiker (n 34) at 241 & 243.

³⁸ Karjiker (n 34) at 243 & 246.

³⁹ Karjiker (n 34) at 244.

Dean argues that this will engender judge-made law and tamper with the principle of separation of powers.⁴⁰ Brown also states in her article about the shortcomings of fair use in the United States that leaving the determination of each copyright infringement case to the federal court comes with high litigation expenses on parties' side and this may discourage smaller, independent artists from filing copyright infringement cases against larger artists who can afford litigation.⁴¹

Okorie makes a crucial remark, regarding the South African copyright reform, that the question must not relate to whether South Africa should employ fair dealing or fair use but should be about what South Africa wants its copyright exceptions to do or achieve for the country.⁴² The study will reflect this as one of the essential factors that the legislator needs to be aware of and well acquainted with in developing its copyright exceptions. It is pertinent to enquire for what purpose does South Africa want 'flexible' copyright exceptions or to reform its exceptions. Does it want these to better balance the conflicting interests and encourage more creativity or it wants them to (solely) be inclusive of the fast-changing technological state? Or is it both?

The objective of the study is, therefore, to bring to mind, the issue and weight of competing interests in copyright law. It seeks to highlight that copyright limitations and exceptions play an important role of balancing the rights of authors or owners with those of users, and this is what the South African legislator should be conscious of when reforming copyright exceptions. It should be wary of creating technologically inclusive exceptions that hardly align with South Africa's needs and fail to serve their principal purpose.

To put its arguments into perspective, the dissertation will, firstly, clarify the issue of the balancing of competing interests in copyright law – in line with the doctrines of fair dealing and fair use. Secondly, it will investigate whether and the extent to which the proposed doctrine shift in the Amendment Bill is suitable for South Africa as far as the balancing of conflicting rights is concerned. To properly conduct this investigation, the

⁴⁰ O Dean 'Copyright Bill – 'Fair use' is an alien system with no roots in our law and does not belong in it' (2022) <https://www.dailymaverick.co.za/article/2022-11-08-copyright-bill-fair-use-is-an-alien-system-with-no-roots-in-our-law-and-does-not-belong-in-it/> (accessed on 11 November 2022).

⁴¹ M Brown 'Not so fair use: the shortcomings of current copyright law in music sampling' (2021) 15 *Brooklyn Journal of Corporate, Financial & Commercial Law* at 450.

⁴² C Okorie 'Long Walk to Copyright Reform (Pt 3): What does/should South Africa want with its copyright exceptions?' (2021) <https://ipkitten.blogspot.com/2021/07/long-walk-to-copyright-reform-pt-3-what.html> (accessed on 30 November 2022).

study will compare the current fair dealing provisions in the Act with the proposed fair use provisions in the Amendment Bill and the fair use provisions in other jurisdictions, thereafter, discuss the advantages and disadvantages of each of the approaches in line with the South African contexts. Further, it will outline factors it deems important for lawmaker's consideration when revising the fair dealing provision to ensure that it adopts laws that reflect the country's state of affairs.

1.3. Research questions

The main research question for the study is: To what extent would the proposed shift from 'fair dealing' to 'fair use' in South African copyright law, achieve a balance between competing interests of various stakeholders? To meaningfully address this question, the study will investigate the following sub-questions:

- i. What are the competing interests in copyright law?
- ii. What is the difference between fair dealing and fair use and how have the two doctrines been applied in specific jurisdictions (South Africa, Singapore and the United States)?
- iii. Given South Africa's context, to what extent would 'fair use' as proposed in the Copyright Amendment Bill [B13F-2017] help achieve the balance sought in South African copyright law?

1.4. Methodology

The research will be conducted by way of a desktop review of journal articles, books, theses, case law and legislation. It will be a critical analysis of 'fair use' as it appears in the Amendment Bill and a comparative study of other jurisdictions such as the US which pioneered a system of fair use, and Singapore which shifted to fair use from fair dealing.

1.5. Limitations of the dissertation

The Amendment Bill touches on various aspects of copyright but this study is not intended to be a comprehensive analysis of the proposals therein. This dissertation, due to its requirements and size, only focuses on the proposals relating to the fair use exceptions and the comparative study it leads will be limited to the laws of the US and Singapore.

1.6. Structure of the dissertation

The dissertation is divided into five chapters. This, being the first chapter, gives an overview and objectives of the dissertation. The second, third and fourth chapters will separately deal with each of the three research questions. Chapter two will discuss the concept of competing interests in copyright law while chapter three will compare and contrast the doctrines of fair dealing and fair use as they apply in South Africa, US and Singapore respectively. A discussion whether the adoption of fair use will aid strike a balance between opposing interests in South Africa will also feature in the chapter. Chapter four will then outline some of the important principles that the legislator needs to reflect on to ensure it adopts an exception approach that suits South Africa. The findings of chapter three and recommendations of chapter four will have their support from the arguments led in preceding chapters. The final chapter, chapter five, will then contain the conclusion of the study.

CHAPTER 2

THE COMPETING INTERESTS IN COPYRIGHT LAW

2.1. Introduction

The purpose of copyright law is to grant the creator of an eligible work a bundle of exclusive rights over the use of their work in the manner by which it can normally be exploited for personal gain or profit.¹ The idea here is to provide benefit to the creator (or author) in order to encourage further creativity and innovation which is necessary for the progress and well-being of humanity.² Needless to say, copyright is founded on the idea of enriching human culture and benefiting the general public before that of benefiting an individual author. It seeks to promote a public good by providing for a private interest.³ Hence, copyright law need not only cater for authors of eligible works but also those who use the works. This is where the issue of competing interests emerges.

Authors and users of copyright works benefit differently from the created materials. Authors through exploitation of their exclusive rights receive monetary rewards for their creations while users gain knowledge, skill and ability to create from consuming and engaging with the created materials. Consequently, authors seek maximum possible rewards for their creativity and effort, which is well within their copyright, whereas users (the public) seek to access learning materials in line with their constitutional rights, particularly the right to freedom expression. In this way, copyright law becomes a legal sphere where creators' private interests ought to be balanced with the interests of the public.

This chapter aims to expand on the aspect of competing interests in copyright law. It will do this by identifying and elaborating on the two groups that play a part in copyright law and discussing their respective interests. In relation to this, the chapter will further discuss the relationship between copyright and the right to freedom of expression. It is important to address the element of "competing interests" because it forms part of and builds on the ultimate enquiry of the dissertation.

¹ OH Dean *Handbook of South African copyright law* (2015) at 1.

² Dean (n 1) at 1-2.

³ A Reid 'Copyright policy as catalyst and barrier to innovation and free expression' (2018) 68 *Catholic University Law Review* at 33.

2.2. The competing interests

2.2.1. Different interests involved in copyright law

There are two broad groups that have opposing interests under copyright law, categorised as those who own the copyright-protected material and those who use such material.⁴

Copyright owners or holders include creators of works, which can be writers, journalists, composers or architects, and those who invest in the creative works such as broadcasters, publishers, record companies or producers.⁵ This group is chiefly concerned with gaining a monopoly in the use or exploitation of their work.⁶ It is through the ability to control the reproduction and distribution of their work and transferability of the rights in their work that the group will earn a financial reward and receive credit for their work.⁷ Copyright, on that account, affords this group a bundle of exclusive rights in respect of their works for this purpose.⁸

There are different rights that attach to different categories of works such as computer programs, published editions, broadcasts, programme-carrying signals, sound recordings, cinematographic films, artistic, literary, and musical works.⁹ In respect of literary and musical works, copyright owners have the exclusive right to do or authorise the doing of the following acts:¹⁰

- (a) Reproducing the work in any manner of form;
- (b) Publishing the work if it was hitherto unpublished;
- (c) Performing the work in public;
- (d) Broadcasting the work;
- (e) Causing the work to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the work, and is operated by the original broadcaster;
- (f) Making an adaptation of the work;
- (g) Doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (e) inclusive.

⁴ V Elia 'Judicialization and the copyright war: Balancing of conflicting interests through the Court of Justice of the European Union' unpublished thesis, Lund University, 2015 at 20.

⁵ Elia (n 4) at 21.

⁶ as above.

⁷ as above.

⁸ Copyright Act 98 of 1978 secs 6-11.

⁹ Copyright Act sec 2(1).

¹⁰ Copyright Act sec 6.

These exclusive rights are a way to incentivise the creation of original works in order to promote creativity and innovation.¹¹ It is deemed copyright infringement when any person who is not an owner of the copyright or who is not licenced to use the relevant work, performs any act which constitutes an exclusive right of the copyright owner.¹² This sometimes lodges an argument that copyright law restricts the public's access to knowledge in favour of private property rights.¹³

Copyright users, on the other hand, are those who use or consume the copyright-protected materials: The researchers, learning institutions and general individuals. Elia argues that the terms 'consume' and 'use', herein, bear different meanings.¹⁴ The scholar suggests that 'consume' refers to passive consumption of the work while 'use', which is mostly used in copyright case law and legislation, entails 'some kind of active engagement with the material, whether for teaching purposes, for review, parody etc, which makes the user a potential creator'.¹⁵ Use and consumption of copyright-protected works is reinforced by the rights to freedom of expression and access to knowledge.¹⁶

According to section 16(1) of the Constitution, everyone is entitled to freedom of expression, which includes '(a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom of scientific research'. This provision entitles the public to access and share information and knowledge and become artistically creative. Access to knowledge is critical for individual fulfilment, cultural awareness and economic development.¹⁷

¹¹ O Dean *et al Introduction to intellectual property law* (2014) at 3.

¹² Copyright Act sec 23(1).

¹³ J Holland 'Copyright law and freedom of expression in South Africa' (2017) 8 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* at 2.

¹⁴ Elia (n 4) at 21.

¹⁵ as above.

¹⁶ B Mhlongo 'Balancing the protection for intellectual property rights of copyright holders against the constitutional right to freedom of expression: A comparison of the South African approach and the United States of America's approach' LLM dissertation, University of KwaZulu-Natal, 2018 at 2; The Constitution of the Republic of South Africa, 1996 (the Constitution) sec 16(1).

¹⁷ T Schonwetter & CB Ncube 'New hope for Africa? Copyright and access to knowledge in the digital age' (2011) 13 *Emerald Group Publishing Limited* at 2.

2.2.2. The relationship between copyright and freedom of expression

The right to freedom of expression is a fundamental human right and ought to be duly respected.¹⁸ Except for in terms of the constitutional limitation clause or general constitutional provisions, no law may limit or impede on this right.¹⁹ Copyright, inasmuch as it is a creature of statute, also enjoys protection in the Constitution, under the property clause.²⁰ As a result, the two rights bear equal status in the Constitution.²¹

Copyright and the right to freedom of expression are both conflicting and complementary. Conflicting in that copyright owners support intensive copyright enforcement because their interest is on reaping the fruits of their intellectual creativity financially and are also considered to drive innovation and creativity.²² Complementary in that it is through accessing the copyright-protected works that one would be able to create.²³ Thus, whereas copyright owners support intensive copyright enforcement, copyright consumers and users consider such rigorous protection problematic since it hinders their access to and creative use of the copyright-bearing material.²⁴

The *PCCW Vuclip (Singapore) PTE Ltd v eTV (Pty) Ltd*²⁵ case exhibits the extent to which copyright owners desire to inhibit unauthorised usage and access of their work. In this case, the applicant had obtained a sole and exclusive licence from the respondent, for 12 months, to disseminate episodes of the latter's two popular soap operas.²⁶ Three months into the agreement, the applicant became aware that its licenced episodes were appearing on a free online application and assumed that those episodes were pirated.²⁷ The licensor, after conducting own investigation, determined that the applicant was facilitating the piracy when they actually had a duty, emanating from an *implied or tacit term*, to protect the licensor's content.²⁸

The licensor advised that this was in breach of two clauses of the licence agreement. Then they demanded the applicant to cure the breaches by ensuring that all of the

¹⁸ The Constitution sec 16.

¹⁹ The Constitution sec 36(2).

²⁰ *Moneyweb (Pty) Ltd v Media 24 Ltd and another* [2016] 3 All SA 193 (GJ) para 108.

²¹ The Constitution sec 36.

²² *Elia* (n 4) at 21.

²³ *Mhlongo* (n 16) at 3-4.

²⁴ as above.

²⁵ *PCCW Vuclip (Singapore) PTE Ltd v eTV (Pty) Ltd* [2021] JOL 51030 (GJ).

²⁶ *PCCW Vuclip (Singapore)* (n 28) para 2.

²⁷ *PCCW Vuclip (Singapore)* (n 28) para 4.

²⁸ my emphasis; *PCCW Vuclip (Singapore)* (n 28) para 9.

licensor's content is removed from the online application within 30 days, if not, then the licensor would cancel the agreement. This clarifies the kind of security or rights that copyright owners wish to have over their content. The court, nonetheless, seemed to regard what the licensor sought as an over-enforcement of copyright – with which it disagreed.²⁹ It was not satisfied that the implied nor tacit terms, as alleged, were present.³⁰ It held that 'no property right of any sort is absolute' nor deserves absolute protection.³¹ Instead of conferring the copyright owner with intensive copyright protection, the court observed the complementary relationship between copyright protection and the right to freedom of expression.³² It highlighted that:

To impose an impossible – or even a very high – standard of security on a licensee risks significantly curtailing the constitutionally protected exchange of ideas that takes place when content is licensed and shared over the internet... The duty to secure the content, at the level eTV pitches that duty, is one that could have a far-reaching impact.³³

The recent *Blind SA v Minister of Trade, Industry and Competition* case, on the other hand, exhibits some of the existing gaps in the Copyright Act, from a user's perspective.³⁴ *In casu*, Blind SA contended that the Act limits the availability of literary works in formats accessible to persons with print and visual disabilities.³⁵ The basis for this contention was that the Act requires the copyright owner's consent before anyone can convert a work into a suitable format for their use.³⁶ As a result, print and visually disabled persons argued that the Act was discriminatory and violated their rights to, *inter alia*, basic and further education and to freedom of expression.³⁷ The court, therein, had to weigh the print and visually impaired persons' constitutional rights with the copyright owner's exclusive right to reproduce the work in any manner or form. It found the Act to indeed have a transgressing effect and declared it invalid and unconstitutional to the extent that it unreasonably limited the print and visually impaired people's rights.

²⁹ *PCCW Vuclip (Singapore)* (n 28) para 31.

³⁰ *PCCW Vuclip (Singapore)* (n 28) paras 35 & 48.

³¹ *PCCW Vuclip (Singapore)* (n 28) para 32.

³² *PCCW Vuclip (Singapore)* (n 28) paras 30-31.

³³ *PCCW Vuclip (Singapore)* (n 28) para 31.

³⁴ *Blind SA v Minister of Trade, Industry and Competition and others (Dean as Amici Curiae)* [2022] JOL 55373 (CC).

³⁵ *Blind SA* (n 38) para 4.

³⁶ Copyright Act sec 23(1).

³⁷ *Blind SA* (n 38) para 24.

The requirement to secure authorisation or consent – in a form of a licence – before being able to use (parts of) the copyright-protected work does not only limit the public's right to access to knowledge but also limits the extent to which users of copyright works can be creative. Ncube asserts that a need to secure a licence before writing and publishing translated material, may be the reason behind under-production of literature in African languages.³⁸ Translators, before creating a derivative of a certain book, for the benefit and enjoyment of English or Afrikaans illiterate and African indigenous people, need to weigh the licence fee required against the profit they anticipate from their work. The scholar opines that:

In the case of South African languages, certain kinds of text-based material, such as textbooks, religious titles and newspapers, are abundant. This is attributable to the 'relative efficiency of production models based on alternative incentive systems'. That is, they are produced because of government procurement policies, evangelism and 'high-volume sales of time-sensitive content and advertising revenue'. Where those factors are absent however, production tends not to occur, leaving other authors with few or no avenues to publish their works.³⁹

This is another way that the Act facilitates private monopolies over information and unconstitutionally 'chills' expression which ultimately frustrates the Constitution's objectives of prioritising the public good.⁴⁰ The irony behind this is that the copyright law itself, is established and developed in the public interest.⁴¹ Providing authors with economic monopolies and protecting their moral rights is in itself in the public interest because it encourages creativity in the society, promotes learning and provides a framework for investment in the creative industries.⁴² Additionally, the very idea in copyright emanates from the right to freedom of expression in that 'the public should have access to copyright works in order to develop'.⁴³ It is through freedom of expression that artists create music, movies and write books for the users and general public to enjoy. Reid writes that:⁴⁴

Creative works are cumulative creations that rely on prior works as building blocks. Creative works are often the output of a first creator and are also an input of a second creator; the second

³⁸ CB Ncube 'Calibrating copyright for creators and consumers: Promoting distributive justice and Ubuntu' in R Giblin & K Weatherall (eds) *What if we could reimagine copyright* (2017) at 258-259.

³⁹ Ncube (n 42) at 256.

⁴⁰ Holland (n 13) at 2.

⁴¹ Mhlongo (n 16) at 3.

⁴² Ncube (n 42) at 260.

⁴³ Mhlongo (n 16) at 3.

⁴⁴ Reid (n 3) at 33-34.

creator's input, therefore, was an earlier creator's output. Tension arises when content creators want to maintain control over their works so they can monetize and commodify them. Content users often resist this control because they want the freedom to remix, mashup, and use someone else's speech to participate in democratic culture-making. This gives rise to a policy dilemma: overprotection threatens user-generated creativity and free expression, yet rampant piracy threatens creative industries.

It is concerning when the same copyright inhibits users from being freely creative. Reid holds an interesting view that the main reason creators are granted monopoly over their works is because they incur costs to create.⁴⁵ The goal, in this light, should be to create sufficient incentives, not maximum incentives.⁴⁶ Therefore, the Act must be wary not to overprotect copyright or overlook the underlying goal of copyright. The following chapter advances a discussion on how the copyright law harmonises competing interests of different stakeholders.

2.3. Conclusion

This chapter addressed the issue of competing interests in copyright law which relates to the general enquiry of the mini dissertation. It elaborated on the two groups that have opposing interests under copyright law, the copyright owners (which includes authors) and copyright users. Since copyright owners are more interested in gaining profit for their works whereas the users need access to the copyright-protected works to enhance their knowledge and further the state of art. The chapter discussed the *Blind SA* and *PCCW Vuclip (Singapore)* case to show both the discord and coherence of copyright protection and freedom of expression. This indicates that copyright could achieve more when a balance between interests of different stakeholders is maintained. The *PCCW Vuclip (Singapore)* case also showed some of the challenges that accompany technological advancements. This shows, in line with the following chapter, the necessity for the copyright law to accordingly balance the opposing rights even in unconventional circumstances.

⁴⁵ Reid (n 3) at 38.

⁴⁶ Reid (n 3) at 38.

CHAPTER 3

FAIR DEALING VS FAIR USE

3.1. Introduction

As demonstrated in the previous chapter, copyright law serves both the private and public interests.¹ It strives to harmonise ‘the interests of copyright holders in profiting from their labour with the interests of the public in [accessing knowledge and] furthering the arts and creative works’.² For this reason, the exception and limitation provisions are used, globally, to mediate between different interests in copyright law. These provisions permit copyright users to, in certain instances, perform acts that would normally result in copyright infringement – acts which only copyright holders can perform.³

In countries like South Africa, where most pressing socio-economic issues such as high unemployment and crime rates are attributable to educational deficiencies, copyright exceptions and limitations play a crucial role in overcoming developmental shortfalls.⁴ It is through these exceptions that access to educational materials can be facilitated and furtherance of creative industries can be promoted.

The most popular of the copyright exceptions are the ‘fair dealing’ and ‘fair use’ provisions.⁵ These terms, although they seem similar, entail different approaches to statutory provisions of copyright exceptions. Different jurisdictions adopt either of the two approaches based on their national contexts and suitability thereof. This chapter aims to clarify the similarities and discrepancies of the two approaches as a basis for the discussion that will follow in the next chapter. Indeed, the suitability of either approach for any jurisdiction will depend on the extent to which such approach reflects the needs, legal principles and obligations of the jurisdiction, prioritises the broader public good while, concurrently, not unfairly taking away from copyright owners. These

¹ T Pistorius & OS Mwim ‘The impact of digital copyright law and policy on access to knowledge and learning’ (2019) 10 *Journal of the Reading Association of South Africa* at 2.

² T Schaefer ‘Sampling and the de minimis exception: Balancing the competing interests of copyright law in sound recordings’ (2020) 55 *Tulsa Law Review* at 340.

³ *Moneyweb (Pty) Ltd v Media 24 Ltd and another* [2016] 3 All SA 193 (GJ) para 111.

⁴ T Schonwetter & CB Ncube ‘New hope for Africa? Copyright and access to knowledge in the digital age’ (2011) 13 *Emerald Group Publishing Limited* at 6.

⁵ S Karjiker ‘Should South Africa adopt fair use? Cutting through the rhetoric’ (2021) *Juta’s Journal of South African Law* at 241.

are what the lawmaker must consider in amending the fair dealing provisions in South Africa.

3.2. Copyright exception provisions

Copyright law provides for exceptions or limitations to exempt certain copyright dealings from constituting infringement.⁶ These exceptions limit copyright owner's monopoly in favour of the public interest. They obviate the need to obtain consent before being able to use the copyright-protected work, in certain instances.⁷ Jurisdictions adopt either the fair dealing or fair use approach to copyright exceptions in line with their developmental considerations and legal systems.⁸

The Berne Convention and TRIPs lay down a three-step test that their member states must comply with in creating their copyright exception provisions.⁹ Members are obliged to confine the exceptions or limitations to: (a) certain special cases; (b) which do not conflict with a normal exploitation of the work; and (c) do not unreasonably prejudice the legitimate interests of the right holder.¹⁰ These three requirements are a standard with which national copyright laws are assessed for compliance. They are cumulative and need to be assessed in their logical order.¹¹

The certain special cases requirement does not have an obvious meaning but has been accepted to mean that the exceptions must not be vague but clearly defined and narrow in scope.¹² The second requirement connects with the first one and is concerned about whether an exempted use economically competes with the ways through which right-holders normally extract economic value from their work.¹³ It disqualifies, from being an exception, any use that competes with the right-holder's usual way of financially benefiting from their work. The third requirement guards against unreasonable prejudice on the right-holder's genuine interests. This requirement links with both the first and second requirements because it is when the

⁶ OH Dean *Handbook of South African Copyright Law* (2015) 92.

⁷ Dean (n 6) at 92.

⁸ Schonwetter & Ncube (n 4) at 6.

⁹ Berne Convention for the Protection of Literary and Artistic Works of 1886 (Berne Convention); Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPs).

¹⁰ TRIPs (n 9) art 13; Berne Convention (n 9) art 9(2).

¹¹ E Rosati 'Copyright reformed: the narrative of flexibility and its pitfalls in policy and legislative initiatives (2011–2021)' (2023) (31)1 *Asia Pacific Law Review* at 49.

¹² Schonwetter & Ncube (n 4) at 5; Rosati (n 11) at 50.

¹³ Rosati (n 11) at 52.

exceptions are clearly defined, limited, and do not deprive the right-holder of the significant commercially gains flowing from their work that they would not disproportionately harm the right-holder's interests.

South Africa, as a signatory to the Berne Convention and TRIPs, does not only need to ensure that it enacts copyright exceptions that well align with its national contexts but also that give effect to and remain within the scope of the three-step standard.

3.2.1. Fair dealing

The fair dealing approach exempts specifically defined acts from being considered copyright infringement in relation to specific categories of works.¹⁴ It provides an exhaustive list of protected uses.¹⁵ If the purpose for which the copyright-protected material was used is not specifically exempted, then there can be no question whether such use is exempted. This approach originates from the traditional English common-law and is employed in many jurisdictions, including South Africa.¹⁶ The South African Copyright Act contains the fair dealing exceptions in sections 12-19.¹⁷ The most well-known are those contained in section 12 of the Act, regarding literary and musical works, providing that:¹⁸

- (1) Copyright shall not be infringed by any fair dealing with a literary or musical work-
 - (a) for the purposes of research or private study by, or the personal or private use of, the person using the work;
 - (b) for the purposes of criticism or review of that work or of another work; or
 - (c) for the purpose of reporting current events -
 - (i) in a newspaper, magazine or similar periodical; or
 - (ii) by means of broadcasting or in a cinematograph film;
- Provided that, in the case of paragraphs (b) and (c) (i), the source shall be mentioned, as well as the name of the author if it appears on the work.

These, and other purposes outlined in section 12 of the Act, apply *mutatis mutandis* to all other categories of works. The purposive nature of this approach provides extra-judicial clarity to users since it specifically states those uses that are exempt from

¹⁴ RM Shay 'Fair deuce: an uneasy fair dealing-fair use duality' (2016) 49 *De Jure* at 106.

¹⁵ Karjiker (n 5) at 242.

¹⁶ PK Yu 'Fair use and its global paradigm evolution' (2019) 1 *University of Illinois Law Review* at 125; Karjiker (n 5) at 241.

¹⁷ Copyright Act 98 of 1978 (Copyright Act).

¹⁸ Copyright Act sec 12(1).

copyright infringement.¹⁹ In this way, the statute becomes a guideline regarding what constitutes both infringement and fair dealing of the material. The approach is also believed to be compliant with the three-step test since it specifically defines the instances that qualify for fair dealing,²⁰ limits exceptions to the defined free expression acts that are deemed reasonable and in so doing, guards against unfair prejudice of the right-holders' interests.

In *Moneyweb v Media 24*, the court indicated that determination of fair-dealing involves a two-stage enquiry: (1) establishing whether a particular use was for an enumerated purpose, and (2) whether such use was fair.²¹ After the court finds a particular conduct permissible, in that it is listed or fits in the ambit of any listed fair dealing purpose,²² it proceeds to decide on whether such conduct is fair. This second leg of the enquiry, as shown in *Moneyweb*, is difficult to determine.²³ *In casu*, the court struggled to determine fairness of the concerned use because of the non-existent statutory factors to consider in this regard. It acknowledged that fairness is elastic and its determination 'involves a value judgment and will depend on the particular facts or circumstances at the time of dealing'.²⁴ This suggests that fairness can change from one judgement to another as there is no established standard to determine it. The most that the courts could do is interpret fair dealing through the prism of the Constitution.²⁵

In its pursuit to decide on whether there was fair dealing for the purpose of reporting current events in a newspaper, the court laid out and considered the following factors:²⁶

The nature of the medium in which the works have been published; whether the original work has already been published; the time lapse between the publication of the two works; the amount (quality and quantity) of the work that has been taken; and the extent of the acknowledgement given to the original work.

It stated, however, that this list of factors is not exhaustive, and further that it is possible for one factor to be more or less important than another, depending on the context in

¹⁹ Shay (n 14) at 106.

²⁰ Schonwetter & Ncube (n 4) at 8.

²¹ n 3, para 102; Karjiker (n 5) at 242.

²² Yu (n 16) at 126.

²³ n 3, para 103.

²⁴ *Moneyweb* (n 3) para 114.

²⁵ *Moneyweb* (n 3) para 106.

²⁶ Copyright Act 98 of 1978 sec 12(1)(c)(i); *Moneyweb* (n 3) para 113.

which the publication occurs.²⁷ These factors, nonetheless, do not seem general or uniform enough to be applicable in other possible fair dealing purposes.²⁸ This judgment exposes the existing gap regarding the fairness leg of the fair dealing enquiry.²⁹ While the fair dealing purposes may provide the desirable clarity and objectivity, the factors to consider to determine fairness do not.

Moreover, the approach is heavily criticised for being rigid, outdated and unresponsive to the ever-evolving technology.³⁰ The rapidly changing technology renders it impossible to anticipate every use that may be permissible nor quickly introduce new exceptions and limitations that accommodate unconventional uses.³¹ The US *Google v Oracle* case exemplifies the new technologically entrenched uses of copyright-protected material that may qualify for exemption but are not already catered for in the legislation.³² The subject-matter of the case was computer program.

In this case, Oracle America Inc was the copyright owner of a computer program that used a popular Java computer programming language (Java SE). Google acquired Android Inc, through which it sought to develop a new software platform for smartphones.³³ To ensure that many programmers who are familiar with the Java language can easily work with its new Android platform, Google copied several lines of the underlying code of Java SE that were part of a tool called an Application Programming Interface (API).³⁴ It copied approximately 11 500 lines of the code, which constituted 0.4% of the entire API.³⁵ The main enquiry of the case was whether the copying of lines fell under the ambit of 'fair use' in the US.³⁶ The court noted that although computer programs have a literary aspect, they differ from normal literary works like books or films because they always serve a functional purpose.³⁷ As a

²⁷ *Moneyweb* (n 3) para 113.

²⁸ DO Oriakhogba & FO Osadolor 'Musings on the fair use and fair dealing exceptions to copyright: Nigeria and South Africa in focus' (2017) (8)1 *Ebonyi State University Law Journal* 150.

²⁹ Oriakhogba & Osadolor (n 30) at 150.

³⁰ Yu (n 16) at 126-127.

³¹ Yu (n 16) at 126-127.

³² *Google LLC v Oracle Am., Inc.* 141 S. Ct. 1163 (2021)
https://www.supremecourt.gov/opinions/20pdf/18-956_d18f.pdf (accessed on 17 September 2023).

³³ *Google* (n 37) at 2.

³⁴ *Google* (n 37) at 3.

³⁵ *Google* (n 37) at 28.

³⁶ *Google* (n 37) at 1.

³⁷ *Google* (n 37) at 15.

result, interpreting whether a use concerning computer program is fair is a rather difficult exercise that highly depends on the facts of each case.

Challenges such as these are not immediate but imminent in developing countries like South Africa. Looking at the *Google* case from a South African perspective, the question would be whether the copying constituted ‘fair dealing’ of the material. To determine this, the court would have to scrutinise the use in question against an exhaustive list of permitted uses. Section 19B of the South African Copyright Act states that the provisions of sections 12(1)(b) and (c) shall, to the extent that they can be applied, apply to computer programs. These provisions, however, only permit fair dealing of a work for the purposes of criticism or review or reporting current events. This hints that the provisions were likely drafted from a literary and musical works’ point of view and are barely relatable to other types of works such as computer programs. Thus, the use or conduct in question would, in the South African context, fail to fit in any of the two enumerated fair dealing purposes.

The above signifies that the Act’s fair dealing provision is, as is, lacking in ensuring the needed balance between competing interests.

3.2.2. Fair use

In contrast to fair dealing, fair use is an open-ended copyright exception approach that has its legislative origin in the United States.³⁸ It was created and first applied in an American case of *Folsom v Marsh* after which it was codified in the US Copyright Act of 1976.³⁹ Although the US fair use system also lists specific purposes similar to those listed in the South African legislation, those are mainly illustrative as to what may be permissible as fair use – any other use may qualify as fair use when assessed against the established criteria.⁴⁰ The US Copyright Act states that fair use of the copyright-protected material, which may include reproduction, ‘for purposes *such as* criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright’.⁴¹ Factors to be

³⁸ Shay (n 16) at 106.

³⁹ *Folsom v Marsh* 9 F. Cas. 342 (C.C.D. Mass. 1841); Shay (n 16) at 106.

⁴⁰ Karjiker (n 5) at 242.

⁴¹ Copyright Law of the United States (Title 17) sec 107; my emphasis.

considered in determining whether a certain use constitute fair use *include* (emphasis added):

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁴²

The phrases ‘such as’ and ‘shall include’ are used in relation to permissible fair use purposes and factors to be considered when determining the fairness of a use, respectively. This hints that the Act does not restrict the fair use purposes nor factors to those it stipulates.⁴³ This allows any kind of use to fit under the clause. Through the application of these factors, the Supreme Court of the United States found the copying of the API in *Google v Oracle* to constitute fair use of the material. The decision was based on the finding that the use served a transformative purpose and Google did not copy a substantial amount of the work but only ‘those lines of code that were needed to allow programmers to put their accrued talents to work in a new and transformative program’.⁴⁴ The court overstressed the transformative function that the copying performed.⁴⁵ Moreover, it held that there was no evidence that the two programs competed in the same market nor that Google’s program exploited the commercial value of the copied program.

The US fair use clause, even without having anticipated the use in that case, it could readily accommodate that use. It is for this reason that the fair use proponents argue that the approach provides inherent flexibility, and easily accommodates digital age uses.⁴⁶ This is the premise from which South Africa, and various other jurisdictions, emanate in their (proposed) departure from fair dealing to fair use.⁴⁷ Singapore is one of the countries that shifted from fair dealing to fair use. However, its fair use system does not directly depict that of the US. Singapore follows a hybrid model of exceptions which starts off with a flexible provision of factors to be considered, similar to those in

⁴² as above.

⁴³ *Google* (n 37) at 14.

⁴⁴ *Google* (n 37) 35.

⁴⁵ *Google* (n 37) at 35.

⁴⁶ Karjiker (n 5) at 243.

⁴⁷ Karjiker (n 5) at 241.

US legislation,⁴⁸ and continues to specifically list permitted uses.⁴⁹ This is the model which the South African Copyright Amendment Bill is proclaimed to follow.⁵⁰ The goal, herein, seems to be the achievement of legal clarity while being accommodative of a myriad of possible uses that might come up.

The South Africa's proposed paradigm shift

Various reports on the South African copyright regime have made recommendations that the Act be amended to cater for its deficiencies. The Department of Trade and Industry had commissioned a WIPO study that made the following statements and proposal:⁵¹

The South African copyright regime does not include exceptions and limitations for the visually impaired or for the benefit of people with any other disability (e.g. dyslexics) as well as for technological protection measures (such as encryption of the protected material) and electronic rights management information (such as digital identifiers). Furthermore, despite the existence of exceptions for purposes of illustration, for teaching and research, the legal uncertainty surrounding the use of works has led to the conclusion of agreements between the collecting societies and educational establishments to the financial detriment of the latter. As exceptions have the potentials to create value... we suggest that DTI should review the Copyright Act in order to introduce limitations in accordance with the Berne Convention three steps test (article 9(2)) and with the fair use provision and to clarify clauses as necessary.⁵²

The Act was, in alignment with this recommendation, reviewed and the first Copyright Amendment Bill was developed and indicated a departure from a system of fair dealing to that of fair use.⁵³ The final Socio-Economic Impact Assessment System (SEIAS) report on the Copyright Amendment Bill also concurred with the WIPO study that the current Act is outdated and has been ineffective in various fields that impact upon people with disabilities, educators, and researchers as far as access to copyright works is concerned.⁵⁴ It further suggested that South Africa needs to incorporate the

⁴⁸ Copyright Act 2021 of Singapore sec 191.

⁴⁹ Singapore Copyright Act secs 192, 193 & 194.

⁵⁰ Parliamentary Monitoring Group 'Copyright Amendment Bill: DTI & CIPC response on flagged clauses' (2018) <https://pmg.org.za/committee-meeting/26598/> (accessed on 15 September 2023); Copyright Amendment Bill [B13F-2017].

⁵¹ P Anastassios 'The economic contribution of copyright-based industries in South Africa' in WIPO *National studies on assessing the economic contribution of the copyright-based industries* (2011).

⁵² Anastassios (n 57) at 299.

⁵³ Copyright Amendment Bill of 2015 sec 12A.

⁵⁴ The Presidency 'Socio-economic impact assessment system (SEIAS) Final impact assessment template (Phase 2) (2017) at 4.

provisions of international treaties in its copyright laws to enhance access to education and knowledge.⁵⁵ This is the light from which the Amendment Bill was drafted.

Section 12A(1) of the latest Amendment Bill stipulates:

(1) (a) In addition to uses specifically authorised, *fair use* in respect of a work or the performance of that work, for purposes *such as* the following, does not infringe copyright in that work:

- (i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device;
- (ii) criticism or review of that work or of another work;
- (iii) reporting current events;
- (iv) scholarship, teaching and education;
- (v) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche;
- (vi) preservation of and access to the collections of libraries, archives and museums; and
- (vii) ensuring proper performance of public administration.
(emphasis added)

The provision continues in section 12A(b) to state that ‘in determining whether an act done in relation to a work constitutes fair use, *all relevant factors* shall be taken into account, *including but not limited to*’ the factors similar to those mentioned above from the US legislation.⁵⁶ The phrasing herein, implies that the purposes and factors to be considered are not limited to those stipulated. Since the proposed fair use exception in the Amendment Bill has its inspiration from Singapore, it might be worth mentioning that the Singapore’s fair use clause and general Act went through amendment since the South African Copyright Amendment Bill was first drafted and tabled.

The new Copyright Act of 2021 of Singapore repealed the old Act, and although their fair use is still hybridised, it is worded and structured differently. The new Act starts by generally stating that ‘It is a permitted use of a work to make a fair use of the work’,⁵⁷ and continues to mention the four factors to be considered to establish fairness of a particular use.⁵⁸ It then proceeds to define fair use for the specific purposes of reporting news, criticism or review and research or study.⁵⁹ For example, section 194 provides regarding fair use for research or study that:

⁵⁵ The Presidency (n 60) at 4.

⁵⁶ emphasis added.

⁵⁷ Singapore Copyright Act sec 190.

⁵⁸ Singapore Copyright Act sec 191.

⁵⁹ Singapore Copyright Act secs 192, 193 & 194.

- (1) Making a copy of a literary, dramatic or musical work for the purpose of research or study is deemed to be a fair use (and section 191 does not apply) if —
- (a) the work is an article in a periodical publication; or
 - (b) no more than a reasonable portion of the work is copied.
- (2) Subsection (1) does not apply to making a copy of an article in a periodical publication if —
- (a) another article in that publication is also copied; and
 - (b) the copied articles deal with different subject matters.

This section and others, however, inasmuch as they clarify the scope of fair use in relation to the outlined works and purposes, state that ‘to avoid doubt, this section does not limit what would otherwise be a fair use’.⁶⁰ This, again, seems to imply that the defined purposes are not exhaustive and where any purpose is not covered in those sections, the four factors must be consulted for guidance. The quoted section also suggests exclusion of application of the four generic factors if a use falls within the ambit of section 194(1) – defined fair use for purposes of research or study. This is something that the South African Amendment Bill does not feature or clarify. It does not elaborate on the enumerated purposes and appears to necessitate consideration of factors regardless of whether or not a specific purpose is defined.

It is generally argued that the proposed fair use provision in South Africa, due to its open-endedness, comes with many shortcomings. Its flexibility is said to come at a price of legal uncertainty and breach of the treaty obligations (three-step test).⁶¹ Because the provision stipulates specific instances that qualify for fair use but does not *limit* such instances to only those that are mentioned, it fails to meet the first requirement of the three-step test that demands the exceptions to be for only certain special cases. This failure to limit the purposes that qualify for fair use makes it easy for any use, even one that might be conflicting with the normal exploitations of the work, to qualify as fair use, consequently, prejudice copyright owner’s interests.

Karjiker opines that the uncertainty attached to fair use is ‘too high a price’ in the South African context.⁶² By not certainly providing for all the uses that are exempted from copyright infringement liability, fair use makes the contentious issue to not only be whether a particular use is fair but also whether such use is for the purpose that

⁶⁰ Singapore Copyright Act secs 193(3) & 194(3).

⁶¹ Karjiker (n 5) at 243.

⁶² as above.

deserves exemption to begin with.⁶³ Both these issues need to be decided by the court, after looking at the facts of a particular case and considering those factors it deems fit.⁶⁴ That being the case, the fair use regime makes it possible for any kind of use to constitute fair use and heavily places the law-making function on the judiciary instead of legislature.⁶⁵

Yu argues that developing countries, due to their limited legal capabilities, economic resources and geopolitical power, often rarely succeed in adopting models which developed countries usually follow.⁶⁶ Sometimes, legal transplants from developed countries align well with the socio-economic standards and legal priorities of developing countries – but this is not always the case. Therefore, South Africa needs to be cognisant of its circumstances before introducing foreign legal concepts.

3.3. Proposed fair use and the balancing of competing interests in South Africa

As discussed in the preceding chapter, the balancing of competing interests is an integral component of copyright law. There is a constant pursuit in copyright law to create an environment that is beneficial for both copyright owners and users. This is the reason there are exclusive rights for copyright owners and exceptions to copyright infringement for users. While a fair dealing system clearly defines permissible uses, fair use does not give much clarity in respect of that. As previously mentioned, fair dealing is not entirely certain as it does not set out the principles to follow or factors to consider when deciding on the fairness of a particular use. However, it does provide a degree of certainty since it limits the possible fair dealing purposes. This allows users to know those instances in which they are allowed to use copyright-protected works to freely express and upskill themselves without infringing copyright owners' rights.

The open-endedness of the proposed fair use provision, on the other hand, makes it difficult for copyright owners and users to know the boundaries within which to remain. Copyright users have the liberty to make unauthorised use of a copyright-protected material for any purpose that they deem fair or justifiable. It would be up to the affected

⁶³ Karjiker (n 5) at 244.

⁶⁴ Karjiker (n 5) at 243.

⁶⁵ O Dean 'Copyright Bill – 'Fair use' is an alien system with no roots in our law and does not belong in it' (2022) <https://www.dailymaverick.co.za/article/2022-11-08-copyright-bill-fair-use-is-an-alien-system-with-no-roots-in-our-law-and-does-not-belong-in-it/> (accessed on 11 November 2022).

⁶⁶ Yu (n 16) at 115.

copyright owner to take the matter for adjudication. Two major problems ensue from this. Firstly, copyright owners' rights become devalued as anyone can use their work for whatever purpose they deem justifiable, and, copyright owners would battle to both understand the extent of their rights and predict the likelihood of success in initiating copyright infringement proceedings.⁶⁷ Secondly, this 'flexible' system comes with a burden to litigate – especially on the copyright owners' side.

Brown states from a US perspective that the fair use enforcement method, firstly, is inefficient because it almost always necessitates litigation and the federal court system has backlog of cases.⁶⁸ Secondly, it leads to inconsistencies in judgements that are based on similar facts because different judges have differing interpretations on how much weight each factor should carry.⁶⁹ Thirdly, it unfairly benefits those who can afford expensive and lengthy court trial.⁷⁰ Even in South Africa, these are the kinds of shortcomings that must be anticipated.

In South Africa, unlike in the US, Singapore or other developed countries, undergoing private court proceedings is a luxury that not all people nor entities enjoy, especially in copyright law. This is proven by a small number of existing copyright law cases in South Africa, let alone those on the principle of fair dealing. Hence, the inherent burden to litigate and inability to predict the outcome of a particular case would automatically create an imbalance between those stakeholders who can afford to undergo court proceedings and incur expenses that come therewith, and those who cannot.

Smaller, independent creators (and work users) would be placed at a less advantage than large, resourceful creators.⁷¹ Smaller copyright users would most likely, due to the fear of potentially being taken to court for copyright infringement, 'tiptoe' regarding using or being inspired by a big creator's work. Big creators, on the other hand, would fearlessly use or even copy the small copyright owners' material. This, as already

⁶⁷ Karjiker (n 5) at 244.

⁶⁸ M Brown 'Not so fair use: the shortcomings of current copyright law in music sampling' (2021) 15 *Brooklyn Journal of Corporate, Financial & Commercial Law* at 450-451.

⁶⁹ Brown (n 74) at 451.

⁷⁰ Brown (n 74) at 445.

⁷¹ Brown (n 74) at 450.

mentioned, portrays non-compliance with the second and third steps of test because it places one stakeholder's interests at an unfavourable position.

Additionally, this regime may facilitate copyright bullying where affluent work creators engage in threatening or oppressing conducts towards the small copyright users regarding their creative abilities. The legitimate users' freedom of expression would be suppressed and, as a result, South African creative industries would considerably decline. This would, in turn, mean that copyright consumers or the general public would have limited access and exposure to educational and creative material. Copyright law, in this way, would favour big-brand copyright owners' interests over those interests of small legitimate users and the public, thus, creating an imbalance between the competing interests. Therefore, South Africa needs to amend its copyright exceptions in a way that aligns with its contexts and not slavishly transplant foreign legal regimes. The next chapter will elaborate on this aspect.

3.4. Conclusion

This chapter focused on the comparison and contrast of the fair dealing and fair use doctrines and whether the proposed shift from the former doctrine to the latter is suitable for South Africa. It started by discussing the treaty obligations that bind South Africa in respect of making the copyright exceptions and limitations and went on to discuss the two doctrines. Fair dealing is a purpose-driven approach that provides a closed list of permissible uses while fair use is an open-ended approach that accommodates any use that aligns with the fairness factors into qualifying as fair use of the material. The main arguments are that fair dealing, although it provides some measure of legal certainty, is rigid and not adaptive to the new technologically launched uses of copyright material whereas fair use provides the necessary flexibility in the digital age but may take away the predictability of law.

The study holds that the specific fair dealing purposes indeed provide the desired certainty and, further, comply with the international three-step test. However, it appreciates the trouble that comes with the lack of established factors to consider in determining fairness under the system of fair dealing. Moreover, while fair use might be accommodative to technological progression, it has more potential to undermine copyright owners' rights by allowing copyright users to use copyright-protected material without authorisation and burdens copyright owners with the need to litigate.

This is not compliant with the three-step test since copyright owners' interests are ultimately prejudiced. Further, because most people do not afford private litigation in South Africa, this could result in an imbalance between the affluent copyright creators or users and the poor ones. Ultimately, the small copyright owners' freedom to create may be suppressed, creativity may decline and the public could be negatively affected.

CHAPTER 4

THE ADOPTION OF FAIR USE IN SOUTH AFRICA

4.1 Introduction

The previous chapter found that the fair use provision, as proposed in the Amendment Bill, may be unsuitable for South Africa since it does not comply with South Africa's treaty obligations, demands constant litigation and could lead to further disparities between the interests of different but equally important stakeholders. This chapter will advance that fair dealing is the most suitable approach for the country, however, as it currently stands, the approach is inadequate. This proves that South Africa is on the right path in trying to amend its fair dealing provisions to bridge the existing gaps.

The chapter aims to propose the angle at which South African legislature should look at the copyright exceptions when making amendments to ensure suitability. It notes that the lawmakers first need to sufficiently know and understand the purpose of revising the exceptions before making any revisions. Since the National Council of Provinces (NCOP) has adopted the Copyright Amendment Bill [B13F-2017],¹ the chapter will analyse the relevant factors and principles that the NCOP had to follow in order to make an informed decision regarding revision of the fair dealing. The current focus of the legislative reform seems to intensively be on the challenges accompanying constant technological change. Whether this is the correct or only premise for South Africa to base its revisions is questionable. Thus, the chapter would make proposals regarding how the fair dealing exceptions may be appropriately revised and applied in South Africa.

4.2 The adoption of fair use in South Africa: fairness or flexibility?

The NCOP has recently, in September 2023, passed the Amendment Bill and sent it back to the National Assembly for concurrence.² The Amendment Bill, as is, is expected to leave Parliament soon and potentially progress to being signed into law this year. This would mean that South Africa shifts from fair dealing to fair use. This study is concerned with the steps and principles that the legislator has followed (or

¹ SA Legal Academy 'In the spotlight: Copyright and Performers' Protection Amendment Bills' (2023) <https://legalacademy.co.za/news/read/in-the-spotlight-copyright-and-performers-protection-amendment-bills> (accessed on 21 October 2023).

² SA Legal Academy (n 1); Copyright Amendment Bill [B13F-2017].

ought to have followed) to satisfy itself about the necessity and suitability of the doctrine shift in South Africa. Okorie makes a crucial remark that it is imperative for the legislator to have principles to be guided by in deciding on whether to have a closed or open-ended list, on the kind of uses to include on the list, and on whether the exceptions would focus on copyright owners or on copyright users while adhering to the three-step test.³ In corroboration with this, Rosati states as follows:⁴

Policy- and law-makers should be wary of superficially framing ongoing and future reform discourse around the narrative of greater flexibility without properly considering, among other things, the nature of copyright, the constraints under international and, where relevant, regional laws and the rigidity that such a narrative might be eventually (and paradoxically in certain instances) leading to.

This clarifies that there is more to the legislative process than just making or revising laws. There are circumstances and principles that need to be regarded and relied on when making laws. In this case, the significant principles or factors that the legislator need(ed) to be guided by and be cognisant of in deciding on the suitable approach of copyright exceptions in South Africa include:

- i. The role of copyright exceptions and limitations in copyright law
- ii. The purpose of the revision or reform
- iii. The international obligations
- iv. The basic principles of the law
- v. South Africa's socio-economic and legal conditions

4.2.1 The role of copyright exceptions and limitations in copyright law

Copyright law mandates that a fair balance is achieved between the different, contrasting and equally important interests.⁵ The fair dealing and fair use provisions cater for those circumstances under which a particular dealing of a copyright-protected work is considered 'fair' and thereby obviate the concerned user from obtaining

³ C Okorie 'Long Walk to Copyright Reform (Pt 3): What does/should South Africa want with its copyright exceptions?' (2021) <https://ipkitten.blogspot.com/2021/07/long-walk-to-copyright-reform-pt-3-what.html> (accessed on 30 November 2022).

⁴ E Rosati 'Copyright reformed: the narrative of flexibility and its pitfalls in policy and legislative initiatives (2011–2021)' (2023) (31)1 *Asia Pacific Law Review* at 35.

⁵ Rosati (n 4) at 53.

authorisation from the copyright owner. Rosati stresses that fairness, in this regard, should not be associated nor conflated with flexibility.⁶ The scholar puts it clearly that:

Fairness and flexibility are different and separate issues: while flexibility may support fairness, it may also give rise to shortcomings... that defeat the very possibility of achieving fair outcomes. As such, a serious policy discourse around copyright demands *fairness – not flexibility for the sake of flexibility*.⁷

The exception provisions must not be mistakenly perceived as users' rights, as they are not.⁸ They are limitations to copyright owners' exclusive rights in favour of third parties' constitutional rights to, most notably, freedom of expression and access to knowledge. After all, copyright protection aims to encourage creativity and innovation by providing work creators with incentives for their labour.⁹ It is this element that underscores the entire existence of copyright law and with it that the desired flexibility does not seem to resonate. Thus, to ensure that the very essence of copyright is preserved, copyright users must not be granted excessive or unlimited freedom in dealing with copyright owners' material.

The broad and limitless nature of the proposed fair use gives an impression that the copyright exceptions are users' rights. It affords boundless freedom to the users such that right-holders' interests would inevitably be prejudiced. This would jeopardise the very objective of copyright law. Instead of encouragement, discouragement of creativity and innovation would ensue.

4.2.2 The purpose of the revision or reform

Legal reform or revision, especially akin to the one that South Africa undertook, is a problem-solving activity that requires rigorous understanding of the inadequacies or inaccuracies that the relevant law presents. The South African legislator, in pursuits to reform the country's copyright exceptions, needs to realise that it is not about whether fair use or fair dealing, but about what South Africa seeks to achieve with its exception provisions.¹⁰ The latter will, however, not be clear unless the legislator thoroughly understands the role that the copyright exception provisions (ought to) play in copyright law and the gaps that the domestic exceptions present in South Africa. It is

⁶ Rosati (n 4) at 53.

⁷ as above.

⁸ Rosati (n 4) at 49.

⁹ OH Dean *Handbook of South African copyright law* (2015) 1-3.

¹⁰ Okorie (n 3).

through sufficient appreciation of such gaps that the purpose to reform fair dealing would be properly discovered.

The South African fair dealing clause has not only shown to be unresponsive to new technological uses but inadequate insofar as it does not lay down the overarching factors to be considered in the determination of fairness of a dealing. In *Moneyweb*,¹¹ the court mentioned an inexhaustive list of factors it deemed relevant for consideration when determining fairness but those only related to the matter at hand.¹² The findings of this case, indicate that the fairness part of fair dealing determination, which is an essential aspect to the balancing of interests, needs development. The legislator seems to have put considerable focus on having modern, flexible exceptions that easily accommodate new technological uses – for greater access of protected works – without due consideration of the impact which that would have on different interests.¹³

Further, as per the previous chapter, it is imperative for the copyright exceptions to comply with the three-step test, balance the competing interests and suit the country's socio-economic contexts. But there are questions around whether these are, at all, part of the purpose for which South Africa seeks to amend its fair dealing exceptions.

4.2.3 The basic legal principles: The rule of law

The purpose of the law is to regulate human conduct and maintain order. To do this, the legal rules must be certain enough to enable people to know how to conduct themselves in specific situations. The South African Constitution states that South Africa is founded on the value of the rule of law.¹⁴ The rule of law is based on the idea that laws must 'be public, general, clear, prospective in their application and relatively stable.'¹⁵ This means that laws should be accessible, uniform, and easily understood. This is one of the fundamental principles of the law that the lawmaker must always be cognisant of in making and developing laws.

¹¹ *Moneyweb (Pty) Ltd v Media 24 Ltd and another* [2016] 3 All SA 193 (GJ).

¹² *Moneyweb* (n 12) para 114.

¹³ The Presidency 'Socio-economic impact assessment system (SEIAS) Final impact assessment template (Phase 2) (2017) at 4.

¹⁴ Constitution of the Republic of South Africa, 1996 sec 1(c).

¹⁵ R Krüger 'The South African Constitutional Court and the rule of law: The Masetlha judgement, a cause for concern?' (2010) (13) *Potchefstroom Electronic Law Journal* at 476.

As Karjiker argues, the desired flexibility in fair use brings uncertainty and this is too much a price – not only in copyright law but in any kind of law.¹⁶ Laws do not necessarily need to be flexible but certain. Inasmuch as it may be beneficial to make flexible laws in these times of rapid technological progression, the essence of law lies in its certainty. It is always a good idea to make laws as definite as possible to ensure uniform interpretation and application and that the lawmaking function does not considerably rest with the judiciary.

4.2.4 The international obligations

As previously emphasised, the international three-step test should be one of the leading principles in reforming copyright exceptions in South Africa.¹⁷ This cumulative test, as prior discussed,¹⁸ plays a role of ensuring that national exceptions are drafted in a way that observes copyright users' constitutional freedoms while not unduly prejudicing copyright owners' exclusive rights. As per the analysis in the previous chapter, the proposed fair use fails to meet the three-step standard because it fails to limit the fair use purposes to those stipulated, and by so doing, fails to meet the subsequent requirements of the test. The legislator must follow the requirements of the test.

4.2.5 South Africa's socio-economic and legal conditions

Due consideration must be afforded to the socio-economic conditions in South Africa. The fair use approach naturally places considerable clarity on the courts and shifts the law-making power from the legislature to judiciary. This has no practicality in a highly unequal country whose judicial system is fraught with backlog of cases. Copyright matters, in South Africa, barely end up in court because various stakeholders do not have the resources nor time to expend on higher courts' litigation. Schonwetter and Ncube assert that the lack of clarity in US' broad fair use clause is compensated by the country's rich bodies of case law, however, such clarifying case law does not exist in South Africa.¹⁹ The famous *Moneyweb* case, in fact, referred to numerous foreign authorities when ruling on fair dealing and the judge acknowledged that 'there does

¹⁶ S Karjiker 'Should South Africa adopt fair use? Cutting through the rhetoric' (2021) *Juta's Journal of South African Law* at 241.

¹⁷ See para 3.2 above.

¹⁸ as above.

¹⁹ T Schonwetter & CB Ncube 'New hope for Africa? Copyright and access to knowledge in the digital age' (2011) 13 *Emerald Group Publishing Limited* at 8.

not appear to be any South African decision on point' in relation to this.²⁰ This is one other thing that the lawmaker should take into account in adopting fair use.

4.3 Recommendations

Fair use seems to be unsuitable for South Africa in many ways including causing legal uncertainty, imbalance of the opposing interests in copyright law, non-compliance with the international obligations and non-alignment with the country's socio-economic and legal contexts. In fact, all of these seem to only be pragmatic under the fair dealing regime. Hence, it would be advisable to, rather than reforming the South African copyright exceptions, revise the fair dealing clause.

The current fair dealing clause is not well drafted – only has a few enumerated purposes of use and lacks the fairness assessing factors. Section 12 in the Copyright Act could be revised to list all the purposes outlined in the Amendment Bill – as they are more comprehensive – and other possible ones, but the list must be closed. The phrase 'for purposes such as the following' as appears in the Amendment Bill could be amended to 'for the following purposes'. This would provide limitation to the scope of copyright exceptions as per the first requirement of the three-step test.

Further, guidelines or factors could be established relating to the 'fairness' question of the fair dealing enquiry. Similar to the list of purposes, the factors in the Amendment Bill seem reasonable enough to also be inserted in the Act to aid in the assessment of fairness of a dealing. These factors assess the substantiality of the part used, whether the use in question is of a commercial nature, or serves a different purpose to that of the original work.²¹ They resonate with the second and third requirements of the three-step test that relate to that the use in question should not compete with the copyright owner's normal way of extracting income from their work and not unfairly take away from them. The legislator could consider adding other factors to the list, for example, whether the use serves a significantly transformative purpose that progresses South African creative industries and economy. This would ensure to not exclude uses that may have a positive impact in the furtherance of art and economy which makes an essential function of copyright protection.

²⁰ *Moneyweb* (n 12) para 103.

²¹ Copyright Amendment Bill [B 13 2017] sec 12A(1)(b).

4.4 Conclusion

In line with chapter three, this chapter corroborated that the fair use approach, although in the process of being passed as law, is not suitable for South Africa. It was concerned about the factors that the legislator used to aid its decision as to whether fair use is what South Africa needs. It, further, set out and discussed the principles that the legislator would find useful when deciding on whether South Africa needs a closed or flexible list of purposes and the types of uses to include in the list. Notwithstanding this, the chapter advances that fair dealing is the most suitable approach for South Africa and an expansion of the approach instead of the shift to fair use might be what the country needs.

CHAPTER 5

CONCLUSION

This study sought to answer whether the proposed fair use, in the Amendment Bill, would adequately achieve the required balance between opposing interests in South African copyright law. It deems this enquiry relevant because a key function of copyright exceptions is to ensure that this balance is reasonably struck. Accustoming exceptions provisions to performing any function not inclusive of this, may be leading astray.

In responding to the general enquiry, the study firstly clarified the issue of competing interests. It established that there are copyright owners who have statutory exclusive rights such as the right to reproduction the work in any form and copyright users who have constitutional privileges such as the right to freedom of expression.¹ As held in *Moneyweb*,² copyright is protected under the constitutional property clause, as such, has the same significance as any other fundamental right. Hence, it should correctly be balanced against other equally valuable rights.

Secondly, the study compared and contrasted the fair dealing and fair use approaches to copyright limitations and exceptions.³ It, herein, referred to foreign laws of the United States and Singapore. Fair dealing entails a definite, closed system of exception provisions while fair use is an open-ended exceptions approach that may better accommodate the ever-changing technological circumstances. Jurisdictions use one of the two approaches according to their legal and socio-economic contexts. However, with the rapidly evolving technologies, countries, including South Africa, seek to modernise their copyright exceptions to be more flexible in order to inherently respond to unconventional uses emerging with digital progression.⁴

The study, however, argues that this modernisation and flexibility does not entail a model that accords with a developing country such as South Africa. It stresses the need for countries to be aware not to transplant legal doctrines, in their legal system,

¹ See para 2.2.1 above.

² *Moneyweb (Pty) Ltd v Media 24 Ltd and another* [2016] 3 All SA 193 (GJ), para 108.

³ See para 3.2 above.

⁴ E Rosati 'Copyright reformed: the narrative of flexibility and its pitfalls in policy and legislative initiatives (2011–2021)' (2023) (31)1 *Asia Pacific Law Review* at 39.

without taking into account relevant principles that may aid in assessing suitability of such doctrines within their contexts. It laid out five principles that South Africa needs to be cognisant of before deciding on the exception approach that fits well within the country's contexts. When discussing the role of copyright exceptions as an overarching factor that needs due consideration, it stressed that copyright exceptions aim to preclude any use or dealing that is 'fair' from being deemed copyright infringement, and fairness, in this regard, should not be equated to flexibility.

Fair use, as proposed in the Amendment Bill, appear to afford unwarranted protection to users' interests at the expense of copyright owners. Its open-endedness almost gives the impression that exception provisions are copyright users' rights instead of a fair curtailment to owners' exclusive rights in favour of public interest. Its lack of clarity may deepen the immediate economic disparities of the country and may have a negative impact on the progression of creative industries. Nonetheless, the dissertation did not imply that the current fair dealing clause is crystal clear nor adequate. It appreciated that sufficient understanding of the gaps that the clause possess is necessary in order to be appropriately revised.

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